

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CRIMINAL ACTION
)	
SOLIMAN S. BIHEIRI,)	04-Criminal-201
)	
Defendant.)	
)	

REPORTER'S TRANSCRIPT

MOTIONS HEARING

Monday, September 27, 2004

BEFORE: THE HONORABLE T.S. ELLIS, III
Presiding

APPEARANCES: OFFICE OF THE UNITED STATES ATTORNEY
BY: DAVID LAUFMAN, AUSA
NEIL HAMMERSTROM, AUSA

For the Government

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(Court recessed, to reconvene 9/28/04 at 2:00 p.m.)

1 issue of collateral estoppel as quickly as possible because
2 that bears on the parties' preparation for trial, is there any
3 reason why, given the sharp focus of the issue, that the
4 parties could not let me have their views by the close of
5 business -- I prefer Wednesday.

6 Any reason, Mr. Laufman, why the government could
7 not comply with that?

8 ATTORNEY LAUFMAN: No, sir.

9 THE COURT: Mr. Onorato?

10 ATTORNEY ONORATO: That is acceptable, your
11 Honor.

12 THE COURT: All right, the close of business
13 Wednesday, September 29th, for further briefing on the
14 collateral estoppel issue.

15 PROCEEDINGS RE: MOTION TO SUPPRESS FISA EVIDENCE

16 RECAPITULATION / RULING BY THE COURT

17 THE COURT: With respect to the motion to
18 suppress the FISA evidence, the Court has now had an
19 opportunity to review the in camera submission by the
20 government, and while much of the material that I reviewed, of
21 course, would be classified, I think it is useful to review
22 briefly on the record the statutory framework and the Court's
23 conclusions based on the review.

24 Before any FISA surveillance can be undertaken, a
25 FISA judge has to approve that surveillance. And before a

1 judge can approve such surveillance, the President has to
2 authorize the Attorney General to approve FISA violations,
3 which I think has occurred.

4 The application has to be made by a federal
5 officer and approved by the Attorney General.

6 There has to be probable cause to believe that
7 the target of the surveillance, electronic surveillance, is a
8 foreign power or agent of a foreign power, which are defined
9 terms -- and that comes up in the Court's review. In other
10 words, the Court has to then review whether they are -- the
11 person who is the target of the surveillance is an agent of a
12 foreign power, as that term is defined, and that the -- it
13 also has to state that the facilities or places at which the
14 electronic surveillance is being directed or is being used or
15 used by that foreign power or agent of the foreign power, and
16 if minimization procedures meet statutory requirements, if
17 the application contains all of the matters required under
18 1804 -- which I'll come to -- then the -- then the FISA Court
19 acts to review it and issues, or not, an authorization to
20 conduct the surveillance.

21 Then there is a further review of a FISA
22 authorization that occurs whenever the government seeks to use
23 a FISA product, as in this case. In this case, the government
24 seeks to use the product of a FISA surveillance of a target
25 and has provided that material to the defendants.

1 I have already covered the part about the
2 defendant's desire to have the government enter into some sort
3 of stipulation which would permit the defendant to argue that
4 the electronic surveillance was extensive and resulted in only
5 a relatively modest number of relevant excerpts or relevant
6 products of the surveillance.

7 I take it that's already happened?

8 ATTORNEY ONORATO: Your Honor, we have not spoken
9 about it since the Court's ruling.

10 One thing I would like to bring to the Court's
11 attention is that we have asked for FISA material, to the
12 extent that it may exist, upon information and belief with
13 respect to Mr. Marzook.

14 We have dealt in court before on the Mr. al-Arian
15 issue, but I would inquire of the -- through the Court of the
16 government whether they do have such material in their
17 possession with respect to Mr. Marzook.

18 That is the second aspect to my motion, which I
19 failed to address before.

20 THE COURT: Why don't you address it first to Mr.
21 Laufman out of the hearing, because I don't think we are going
22 to quite finish it today. We are going to try. We may not.
23 If we don't we are going to continue tomorrow until we finish
24 this matter. The quicker we can finish all of these motions,
25 the better, including the government's motions, which I will

1 review.

2 But in any event, the FISA application targeting
3 this particular person, al-Arian, appears to the Court, after
4 review, ex parte and in camera, which the defendants are
5 entitled to have this Court do -- and that's essentially what
6 their motions called upon the Court to do -- and that review
7 reveals that the FISA application targeting al-Arian did
8 satisfy the requirements of the Act.

9 The reason I review it in camera and ex parte is
10 that the Attorney General has filed an affidavit under oath
11 that the disclosure in an adversary hearing would harm the
12 national security, and that's conclusive.

13 Even so, the Court may disclose to an aggrieved
14 person under the appropriate security procedures, protective
15 orders or other things, materials relating to the surveillance
16 only where the disclosure is necessary to make an accurate
17 determination of the legality of the surveillance. I saw
18 nothing in here to require that. There is sufficient
19 information.

20 The application contains a fairly complete
21 statement of the facts and circumstances relating to al-Arian
22 and his affiliation with a group that is, in the Court's view,
23 accurately termed a foreign power. I'll come back to that.

24 And the application sets forth the minimization
25 procedures reasonable under the Act, a detailed description of

1 the nature of the information sought, and also whether
2 previous applications had been sought, and also the duration
3 of the surveillance.

4 Now, with respect to the fact that he target has
5 to be a foreign power or an agent of a foreign power, I am
6 satisfied that the application accurately identifies the
7 target who is an agent of a foreign power.

8 The statute describes that any person who
9 knowingly engages in international terrorism or knowingly aids
10 or abets any person in the conduct of such activities is an
11 eligible person. And of course, the body is the body
12 mentioned -- or the powers is the body mentioned in the
13 indictment, the PIJ.

14 It also has to set forth probable cause. And
15 probable cause here, like probable cause under the Fourth
16 Amendment, is essentially similar. It's a common-sense,
17 practical decision as to whether all the circumstances set
18 forth in the affidavit, taken together, compel the conclusion
19 that there is a fair probability that the evidence of the
20 crime will be found.

21 Essentially, it's the same as for a search
22 warrant. And here there is sufficient evidence in the
23 applications, in the affidavit supporting them, setting forth
24 facts on which it's based, to conclude that the surveillance
25 of al-Arian was supported by probable cause, he being the

1 agent of a foreign power, the PIJ. And I think the PIJ is
2 appropriately termed a faction of a state and, and al-Arian
3 was properly determined to be an agent.

4 So, I think all in all, this affidavit is clear
5 about those matters and clearly meets the requirements of the
6 statute. The required certifications existed.

7 The standard under which the Court reviews those
8 is very deferential. It is the clearly erroneous standard,
9 and in the Court's view they are not clearly erroneous.

10 So, the motion to suppress must be denied, the
11 Court having found that the FISA applications were properly
12 issued under the statute and supported by all the requirements
13 contained in the statute.

14 I'll take up -- so the motion to suppress on
15 FISA, the FISA grounds, is denied.

16 There is a further request that you just made,
17 Mr. Onorato. Tell me what that was again.

18 ATTORNEY ONORATO: Yes. Just like Sami al-Arian,
19 we believe the government also has FISA materials with respect
20 to Mr. Marzook.

21 THE COURT: Has it produced any to you?

22 ATTORNEY ONORATO: No.

23 THE COURT: Well then it doesn't intend to use
24 any, apparently. If it doesn't intend to use any, the only
25 reason it would be required to disclose any is if it had

1 Brady.

2 I would assume they have reviewed it for Brady.

3 Is that right, Mr. Laufman?

4 ATTORNEY LAUFMAN: Your Honor, if I may, upon
5 inquiry, I am unaware of any FISA coverage OF Mr. Marzook. If
6 Mr. Onorato has information he wants to bring to our
7 attention, I would be happy to act upon it.

8 THE COURT: There you have it, Mr. Onorato. He's
9 not aware of any FISA. If you know of any, let him know.

10 ATTORNEY ONORATO: Your Honor, if the government
11 is saying there is no FISA material with regard to Mr.
12 Marzook, we would not be able to prove that. Obviously, we
13 would want to put it on --

14 THE COURT: In this day and age, one never knows.

15 ATTORNEY ONORATO: -- we want to be able to put
16 it on record that if any issue comes about, that it would be
17 an issue to be addressed.

18 THE COURT: Well, the issue would only be that
19 they would have to review it for Brady. If there is no Brady,
20 that's it.

21 ATTORNEY ONORATO: We understand the Court's
22 position, as we articulated before. Now, they are contending
23 that these two men had an extensive business and social
24 relationship and personal relationship, and you have the
25 absence of phone calls, similar to Mr. al-Arian, we do think

1 that that would rise to the level of Brady under the case law.

2 THE COURT: Well, I didn't agree with you that it
3 would rise to the level of Brady. I don't think it does.

4 However, I think the inference that you want to
5 draw is a reasonable inference, and you could ordinarily ask
6 those questions in a normal case about surveillance, just like
7 you -- just like defendants typically ask whether there were
8 fingerprints taken, or: How long did you listen?

9 But that's different from saying it's Brady. The
10 fact that there is an allegation that they were close social
11 friends, there is nothing in 3(a)(1.4) or 1001 that says they
12 have to prove that. They may allege it, but they don't have
13 to prove that.

14 ATTORNEY ONORATO: Well, for 1001, as I
15 understand the government's theory of the case, it is that Mr.
16 Biheiri denied the extent of his social and business
17 relationship with either of these gentlemen.

18 THE COURT: Well, he denied any business
19 relationship with Marzook. That's the heart of it.

20 ATTORNEY ONORATO: Business with Marzook, and
21 there is also a social component of that relationship --

22 THE COURT: Well --

23 ATTORNEY ONORATO: -- as I understand the
24 allegation.

25 THE COURT: -- let me be clear. The fact that

1 they have listened and didn't hear anything, as long as what
2 they didn't hear anything that they want to use, as long as
3 what they heard wasn't exculpatory, then it is not Brady.

4 The government is not required, every time they
5 undertake an investigative step that comes up empty-handed, to
6 tell the defendant: We took an investigative step and came up
7 empty-handed. It is not required.

8 ATTORNEY ONORATO: I understand the Court's
9 position, just so our argument is clear for the record.

10 Your Honor referred to PIJ as being a state, or
11 called it a state --

12 THE COURT: No, I said it's a foreign power.
13 It's a faction of a foreign power.

14 ATTORNEY ONORATO: I wanted to clarify that for
15 FISA purposes.

16 THE COURT: All right.

17 Do you have anything you want to add?

18 I'm not going through, Mr. Onorato, in detail
19 what's in the application. So, I am summarizing only very
20 briefly what --

21 ATTORNEY ONORATO: Your Honor, just for the
22 record, we understand that the Court took this review and we
23 respect the Court's ruling with respect to whether there was
24 probable cause, and I think we are satisfied with the finding
25 that the Court has made.

1 THE COURT: Well, I think straightforwardly,
2 though, Mr. Onorato, the PIJ is a faction of a foreign power
3 in contest for control of the foreign territory, which would
4 include Israel, and there is a whole history in the -- I
5 wouldn't say a whole history, but there is some considerable
6 additional information about the PIJ in the affidavit that I
7 think, in the Court's view, make it an appropriate candidate
8 for the statutory term of a foreign power.

9 And also, I didn't -- I also looked to see,
10 because the statute requires that if the target is an American
11 person, which is defined as either a citizen or a person who
12 is a lawful permanent resident.

13 I had to scratch my head on this one, because I
14 had to think about when the -- I think that at the time Mr.
15 al-Arian was a lawful permanent resident.

16 Wasn't he, Mr. Laufman? Because it can't address
17 any First Amendment activities of those individuals.

18 ATTORNEY LAUFMAN: Your Honor, I would want to
19 consult with the agent to confirm the correctness of my
20 understanding.

21 THE COURT: Well, I assumed he was a lawful
22 permanent resident, and I looked in the application to insure
23 there wasn't an abridgement of his First Amendment rights, and
24 I was satisfied.

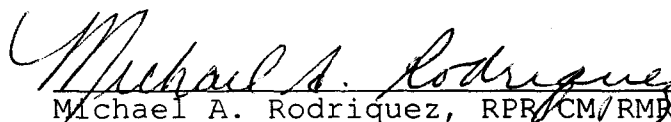
25

1
2 CERTIFICATE OF REPORTER
3
4

5 I, MICHAEL A. RODRIQUEZ, an Official Court
6 Reporter for the United States District Court, in the Eastern
7 District of Virginia, Alexandria Division, do hereby certify
8 that I reported by machine shorthand, in my official capacity,
9 the proceedings had upon the motions hearing in the case of
10 UNITED STATES OF AMERICA v. SOLIMAN S. BIHEIRI (#2, 04-201).
11

12 I further certify that I was authorized and did
13 report by stenotype the proceedings in said motions hearing,
14 and that the foregoing pages, numbered 1 to 133, inclusive,
15 constitute the official transcript of said proceedings as
16 taken from my machine shorthand notes.
17

18 IN WITNESS WHEREOF, I have hereto subscribed my
19 name this 22nd day of December, 2004.
20

21 
22 Michael A. Rodriguez, RPR/CM/RMR
23 Official Court Reporter
24
25

MICHAEL A. RODRIQUEZ, RPR/CM/RMR

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FAWAZ MOHAMMED DAMRAH,
aka FAWAZ DAMRA,

Defendant.

CASE NO. 1:03-CR-484

ORDER

[Resolving Doc. Nos. 69 and 71]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On April 26, 2004, Defendant Fawaz Mohammad Damrah ("Damrah") moved this Court for an order suppressing evidence of a wiretap from his trial [Doc. No. 69]. That same day, Damrah also moved this Court for an order compelling the disclosure of the application for and order permitting the wiretap evidence [Doc. No. 71]. For the reasons contained in this Order, the Court DENIES both motions.

Background

On December 16, 2003, a grand jury in the Northern District of Ohio issued a secret indictment against Damrah. Damrah has served as the Imam (Islamic spiritual leader) at the Islamic Center of Cleveland, the largest mosque in Ohio, since the early 1990s. The indictment alleged that Damrah had lied on immigration forms by failing to reveal his ties to terrorist organizations and also a past conviction. On January 13, 2004, federal agents arrested Damrah in his home, and took him to the federal courthouse in

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Cleveland, where this Court arraigned him that day. The case has remained pending since then.

On April 26, 2004, the United States of America ("United States") filed a Notice of Intent to Use Foreign Intelligence Surveillance Act Information [Doc. No. 68]. In this notice, the United States revealed that it planned to use information derived from electronic surveillance authorized under the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801, *et seq.* Dr. Sami Al-Arian, a professor at the University of South Florida and the alleged head of the Palestinian Islamic Jihad's American arm, was the target of the surveillance that led to the materials.

The same day, Damrah moved this Court to suppress that evidence and to compel disclosure of the government's application for, and the Foreign Intelligence Surveillance Court's order permitting, electronic surveillance of Dr. Al-Arian [Doc. Nos. 69 and 71]. On May 10, 2004, the United States filed an affidavit, signed by the Acting Attorney General, saying that disclosure of, or an adversary hearing on, the FISA application and order would harm the national security interests of the United States [Doc. No. 84]. Section 1806(f) of FISA instructs the Court to conduct an *in camera, ex parte* review of the application and order upon receiving such an affidavit from the Attorney General. 50 U.S.C. § 1806(f). The Court has conducted such a review and now considers Damrah's motions.

Applicable Law

FISA constructs a scheme under which a special court may authorize electronic surveillance of "foreign powers and their agents." *See* 50 U.S.C. § 1804(a)(4)(A). Included among "foreign powers" are "group[s] engaged in international terrorism or activities in preparation therefor." *Id.* at § 1801(a)(4).^{1/}

^{1/} FISA defines international terrorism as activities that

(continued...)

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To obtain permission to conduct such surveillance, an agent of the government must apply to the Foreign Intelligence Surveillance Court (an institution created by 50 U.S.C. § 1803). This application must contain certain information. More specifically, 50 U.S.C. § 1804 requires that a FISA application contain:

- the identity of the Federal officer making the application;
- the Attorney General's approval of the application;
- the identity, if known, or a description of the target of the electronic surveillance;
- a statement of the facts and circumstances indicating probably cause that (1) the target of surveillance is a foreign power or an agent of a foreign power, and (2) each of the facilities or places at which the electronic surveillance is directed is being used by a foreign power or an agent of a foreign power;
- a statement of the proposed minimization procedures;
- a detailed description of the nature of the information sought and the type of communications or activities subject to surveillance;
- various certifications by an executive branch official in the area of national security;^{2/}

^{1/}(...continued)

- (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
- (2) appear to be intended—
 - (A) to intimidate or coerce a civilian population;
 - (B) to influence the policy of a government by intimidation or coercion; or
 - (C) to affect the conduct of a government by assassination or kidnapping; and
- (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrator operate or seek asylum.

50 U.S.C. § 1801(c).

^{2/}More specifically, the official must certify: (1) that the certifying official deems the information sought to be foreign intelligence information; (2) that a significant purpose of the surveillance is to obtain foreign intelligence information; (3) that such information cannot reasonably be obtained by normal investigative techniques; (4) that designates the type of foreign intelligence information being sought; and (5) that the information sought is the type of foreign intelligence information designated and that such information cannot reasonably be obtained by normal investigative techniques. 50 U.S.C. § 1804(a)(7).

- a statement of the means by which surveillance will be conducted, including a statement whether physical entry will be required;
- a statement of facts concerning all previous FISA applications regarding the same people, facilities, or places described in the instant application;
- a statement of the period of time for which the surveillance is to continue; and
- when multiple surveillance devices are to be used, the scope of the devices' coverage and the applicable minimization procedures.

Id. at § 1804(a). If the application contains all of these requirements, a judge of the Foreign Intelligence Surveillance Court^{3/} may issue an order under 50 U.S.C. § 1805 permitting the surveillance to commence. Generally, FISA surveillance lasts no longer than ninety days. *Id.* at § 1805(e)(1).

The government may use information gleaned from FISA surveillance at trial or at any other hearing, provided that it follows the protocol established in 50 U.S.C. § 1806. At a reasonable time before such use, the government must notify the court and the "aggrieved person"^{4/} of its intent to so use the information. *Id.* at § 1806(c). Once the United States gives such notice, the defendant may move to suppress the information under 50 U.S.C. § 1806(e). FISA permits two grounds for suppression. First, the court may suppress evidence from FISA surveillance because the United States unlawfully acquired it. *Id.* at 1806(e)(1). Alternatively, the court may suppress the evidence if the government did not conduct the surveillance in conformity with the order approving FISA surveillance. *Id.* at 1806(e)(2).

However, if the Attorney General files with the Court an affidavit saying that disclosure of the FISA

^{3/}Under 50 U.S.C. § 1803(a), the Chief Justice of the United States Supreme Court publicly designates eleven judges from at least seven of the judicial circuits to serve on the Foreign Intelligence Surveillance Court. Section 1803(d) limits the judges to seven-year unrenewable terms.

^{4/} FISA defines "aggrieved person" as the target of the surveillance "or any other person whose communications or activities were subject to electronic surveillance." 50 U.S.C. § 1801(k).

application and/or order would be detrimental to the United States' national security interests, the Court must conduct an *ex parte, in camera* review of the documents to decide whether the FISA surveillance was lawful. Thus, FISA puts defendants in the awkward position of arguing that the surveillance was unlawful at a time when they can access neither the application documenting the probable cause justifying the surveillance nor the order authorizing the surveillance. The only way a defendant may get to review the application and order is when disclosure to the aggrieved person is "necessary to make an accurate determination of the legality of the surveillance." *Id.* at § 1806(f).^{2/}

Analysis

To rule on Damrah's motions, the Court must answer two questions. First, the Court must answer whether it can determine whether the surveillance of Dr. Sami Al-Arian was legal without first consulting Damrah. The answer to this question will determine the outcome of Damrah's motion to compel disclosure of the FISA materials. Second, if the answer to the first question is affirmative, the Court must determine whether the surveillance was legal in order to rule on Damrah's motion to suppress. To answer this second question, the Court must determine whether the application and order contained the required disclosures and findings, and also whether sufficient probable cause justified the surveillance.

Before delving into these questions, the Court notes that the FISA application and order are still classified documents, and therefore the Court may not discuss them in any detail. This opinion will thus be conclusory, not from a half-hearted inquiry by the Court, but rather of necessity.

^{2/} This section of FISA permits disclosure to the "aggrieved person" under these circumstances. Thus, it is not at all clear that FISA would permit Damrah's attorneys to review the application and order in any circumstances, as they are not aggrieved persons under the Act.

The Court first concludes that it can adequately determine the legality of the surveillance without first consulting Damrah. The materials in the FISA application and order are sufficient for the Court to rule on this issue. Even if they were not, however, it is not clear that Damrah would aid the Court in its determination, as he was not the target of the surveillance. Although Damrah still qualifies as an "aggrieved person" under FISA, disclosing the application and order to him would not be "necessary" for the court to evaluate the search's legality, as he likely lacks the information that would aid the Court. For these reasons, the Court answers the first question in the negative, and thus DENIES Damrah's motion to compel disclosure.

Next, the Court concludes that the surveillance was lawful, supported by probable cause, and conducted in accordance with the Foreign Intelligence Surveillance Court's order approving surveillance. The Court finds that the government's application for FISA surveillance contained all the relevant information required by 50 U.S.C. § 1804, and that the Foreign Intelligence Surveillance Court's order approving surveillance contained all the findings required by 50 U.S.C. § 1805. As both of these documents are classified, the Court is unable to discuss them in greater detail. However, the Court does note that the Foreign Intelligence Surveillance Court judge reviewing a FISA application "is not to second-guess the executive branch official's certifications" contained therein. *In re Grand Jury Proceedings*, 347 F.3d 197, 205 (7th Cir. 2003). Similarly, "a reviewing court is to have no greater authority to second-guess the executive branch's certifications than has the FISA judge" *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984). Even were that not the case, however, the Court finds that the surveillance in this case was properly applied for and properly approved under FISA. The Court therefore DENIES Damrah's motion to suppress the FISA evidence.

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Conclusion

For the reasons explained above, the Court DENIES both Damrah's motion to suppress evidence obtained from the FISA search of his home, as well as his motion to compel disclosure of FISA documents.

IT IS SO ORDERED.

Dated: June 9, 2004

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE